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No. 88-916

In The

Supreme Court of the United States

October Term, 1988

WINSTON A. MITCHELL, M.D.,
WINSTON A. MITCHELL, M.D., INC.,

Petitioners,

v.

FRANK R. HOWARD MEMORIAL HOSPITAL,
ROBERT HARRAH, STEVEN WENTWORTH, M.D.,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

JOINT BRIEF OF RESPONDENTS IN OPPOSITION

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ISSUE

Whether the Court of Appeals correctly concluded under *McLain v. Real Estate Board of New Orleans, Inc.*, 444 U.S. 232 (1980) that respondent Hospital's activities, as a matter of practical economics, lacked a substantial effect on interstate commerce so as to establish jurisdiction under sections 1 and 2 of the Sherman Act, 15 U.S.C. §§1, 2, where:

(1) The Hospital's former exclusive radiologist challenges the Hospital's decision, after competitive bidding, to award an exclusive one-year contract for such hospital-based services to another radiologist;

(2) The Hospital does not treat out-of-state patients;

(3) The Hospital's radiology department purchases all of its equipment and supplies within California; and

(4) The connection with interstate commerce upon which petitioner principally relies is the Hospital's receipt of Medicare, Medi-Cal and out-of-state private insurance payments, which patients have assigned to the Hospital.

PARTIES TO THE PROCEEDINGS

Plaintiffs and petitioners are WINSTON A. MITCHELL, M.D., and WINSTON A. MITCHELL, M.D., INC.[A]

Defendants and respondents are FRANK R. HOWARD MEMORIAL HOSPITAL, a California nonprofit public benefit corporation; ROBERT HARRAH, the chairman of the Hospital's board of directors; and STEVEN WENTWORTH, M.D., the radiologist for the Hospital.[B]

A Petitioner Mitchell has sued in his own name and that of his wholly-owned corporation. Since the Hospital's relationship was always with Dr. Mitchell, not his corporation, respondents will refer to petitioners in the singular.

B Robert Harrah has been and is represented separately from the Hospital and Dr. Wentworth, but respondents submit this joint brief in opposition to the petition.

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OPINIONS BELOW

The decision and opinion of the Ninth Circuit Court of Appeals is published at 853 F.2d 762. Petition Appendix ("App.") A. The judgment and memorandum of decision of the United States District Court for the Northern District of California are unreported. App. B. Petitioner did not request a rehearing from the Ninth Circuit.

JURISDICTION

The decision of the Ninth Circuit was filed on August 9, 1988. This Court granted petitioner an extension of time to November 28, 1988, in which to file and serve a petition for writ of certiorari. The petition was filed and served by mail on November 28, 1988. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

This case arises from the Hospital's decision, after competitive bidding which included petitioner, to replace petitioner's exclusive oral agreement to provide hospital-based radiology services with an exclusive one-year written contract for such services with another radiologist. Petitioner claims that the exclusive written contract establishes a tying arrangement and constitutes a denial of essential facilities in violation of sections 1 and 2 of the Sherman Act. 15 U.S.C. §§ 1, 2. The district court entered summary judgment for the Hospital on the antitrust claims on the ground that the Hospital's activities did not, as a matter of practical economics, have a sufficient impact on interstate commerce to support jurisdiction under the Sherman Act. Relying upon this Court's seminal decision in *McLain v. Real Estate Board of New Orleans, Inc.*, 444 U.S. 232 (1980), the Ninth Circuit Court of Appeals affirmed, also finding that petitioner had failed to show that the Hospital's activities had a sufficient effect on interstate commerce as a matter of practical economics to support jurisdiction under the Sherman Act.

Frank R. Howard Memorial Hospital is a small, 38-bed facility located in the rural town of Willits (pop. 4,200), Mendocino County, California, more than 150 air miles (and almost 250 road miles) from the nearest state border and over 100 miles from San Francisco, the nearest urban center. The Hospital serves an exclusively California patient population. From 1983 through 1986, virtually none of the Hospital's patients were from out of state. As required by California law, the Hospital provides hospital-based radiology services, primarily on an out-patient basis, to its patients. All of the Hospital's radiology equipment and supplies, including film and chemicals, are procured in California. The Hospital's gross annual revenues are approximately $5 million; the annual gross revenues of the Hospital's radiology department are approximately $600,000. Although the Hospital's overall Medicare reimbursement revenue is higher, only approximately 23 percent of the Hospital's annual gross radiology revenue, or $142,762 for FYE 1984 and $146,012 for FYE 1985, is derived from its patients' Medicare entitlements which are assigned to the Hospital. Also by assignment, the Hospital receives revenue from private out of state insurers for radiology services rendered to its local patients.

Measured against other hospitals, Frank R. Howard Memorial Hospital has an insignificant impact outside its local community. The average hospital in the United States has 168 beds, almost five times as large as respondent. Hatton, "Urban and Rural Hospitals," 8 Health Care Financing 77, 80 (Winter 1986). Approximately 90 percent of acute-care hospitals in California are larger than Howard Memorial, and most of the other hospitals

are only slightly smaller. American Hospital Association Guide to the Health Care Field (1984) at A22-A43. The Hospital's annual gross revenue is only 15.3 percent of that of the average California hospital, and only 10.1 percent of that of the average hospital in San Francisco. California Health Commission Quarterly Finance and Utilization Report (1st Quarter 1985) at 40, 43-44, 70. In 1983, the average individual radiologist nationwide received $116,679 from Medicare reimbursements. Burney, "Medicare Physicians' Services," 7 Health Care Financing Review 81, 85 (Fall 1985). This is approximately 82 percent of the Hospital's total Medicare reimbursement for radiology services in 1984.

Petitioner Winston A. Mitchell, M.D., was the Hospital's exclusive radiologist under an oral agreement from July 1980 through August 31, 1985. The Hospital terminated the agreement effective August 31, 1985, because of irresolvable differences that had arisen with petitioner over the nature and terms of his services, including his rejection of the Hospital's proposed written contract and his unilateral decision, notwithstanding the Hospital's express requirement of full-time radiology services for its patients, to provide only part-time services so that he could also work at another hospital almost 100 miles away in Garberville, California. The Hospital's action had no effect on his position at the Garberville hospital. Moreover, contrary to petitoner's assertion, neither the Hospital nor its Medical Staff took any action against petitioner's Medical Staff membership or clinical privileges. Petitioner retained his privileges at the Hospital and, had he chosen to do so, could have continued to

provide consultation services upon the request of other physicians or their patients.

Following the termination of petitioner's contract, the Hospital began a search for a new radiologist and engaged in a seven-month inquiry into whether it should provide hospital-based radiology services through an open staff or an exclusive contract. The Hospital's investigation overwhelmingly supported an exclusive contract: not only would the Hospital be able to assure full-time, high-quality radiology services through an exclusive contract but, because the Hospital's patient census would support only one full-time radiologist, all of the seriously considered applicants, except petitioner who already had a de facto monopoly on the Hospital's radiology services, refused to consider the position without an exclusive arrangement. Based on this study, the Hospital's Board of Directors concluded that a short-term exclusive contract would best serve the patient care standards and goals of the Hospital. Accordingly, on April 2, 1986, the Board awarded a one-year written contract, virtually identical to that which petitioner had previously rejected, to respondent Steven Wentworth, M.D.

Seven months earlier, however, on August 30, 1985, petitioner had sued the Hospital in the Mendocino County Superior Court seeking, among other things, to enjoin the Hospital from entering into an exclusive contract for hospital-based radiology services. On three separate occasions, the state court rejected petitioner's application for preliminary injunctive relief, finding each time that he had failed to show a reasonable probability that the proposed exclusive contract was unlawful. In fact, the provision of hospital-based radiology services

through an exclusive arrangement is common throughout the United States and has been authorized by statutory or case law in California for over 20 years.[1]

On October 7, 1986, petitioner filed the instant action, incorporating the claims asserted in the state proceeding and asserting further that the exclusive radiology contract violated the Sherman Act by creating an unlawful tying arrangement and denying an essential facility. Relying on *McLain*, the district court granted summary judgment to the Hospital on the antitrust claims on the ground that petitioner had failed to show that either the Hospital's overall business activities or its provision of radiology services substantially affected interstate commerce so as to establish jurisdiction under the Sherman Act. App. 2b-3b.[2] Rejecting petitioner's main contention

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[1] See Cal. Welfare & Inst. Code § 14087.28(a); *Centeno v. Roseville Community Hospital*, 107 Cal. App. 3d 62, 71-73, 167 Cal. Rptr. 183 (1979) (hg. den.); *Lewin v. St. Joseph Hospital of Orange*, 82 Cal. App. 3d 368, 146 Cal. Rptr. 892 (1978); *Letsch v. Northern San Diego County Hospital District*, 246 Cal. App. 2d 673, 55 Cal. Rptr. 118 (1966) (hg. den.); *Blank v. Palo Alto-Stanford Hospital Center*, 234 Cal. App. 2d 377, 44 Cal. Rptr. 572 (1965) (hg. den.).

[2] Contrary to petitioner's suggestion, summary judgment is as available in antitrust cases as in any other matter. See, *e.g.*, *Doe v. St. Joseph's Hospital of Ft. Wayne*, 788 F.2d 411 (7th Cir. 1986); *Stone v. William Beaumont Hospital*, 782 F.2d 609 (6th Cir. 1986); *Seglin v. Esau*, 769 F.2d 1274 (7th Cir. 1985). Indeed, this Court has recently emphasized the availability of summary judgment in all actions, including antitrust cases, where the evidence adduced by the parties establishes that the issues may be properly resolved without the necessity for a trial. See *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-252 (1986);

(Continued on following page)

that the Hospital's receipt of Medicare and out-of-state private insurance funds established jurisdiction as a matter of law, the district court observed:

> "Determinations of jurisdiction are based not merely upon revenue figures, but on a broad aggregate of factors including proximity of the facility to regional centers of commerce or to other states, treatment of significant numbers of out of state patients, purchase of equipment and supplies from interstate sources and interstate transfer of payment for patient care." *Ibid.*

The Ninth Circuit affirmed. Relying on *McLain*, as well as other decisions of this Court and of the courts of appeals, the Ninth Circuit correctly recognized that, in order to establish jurisdiction under the Sherman Act, petitioner was required to show that the Hospital's local activities nonetheless have "an effect on some other appreciable activity demonstrably in interstate commerce." 853 F.2d at 764, App. 4a, quoting *McLain*, 444 U.S. at 242. Further explaining this principle, the Ninth Circuit also recognized, correctly, that whether a hospital's activities substantially affect interstate commerce is decided "as a matter of practical economics" based on a consideration of a "broad aggregate of factors" and is "a highly fact-based question calling for common sense judgment."

(Continued from previous page)

Celotex Corp. v. Catrett, 477 U.S. 317 (1986); *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986). Summary judgment is especially appropriate with respect to claims, such as those here, that the courts have found to be, at best, on the fringe of the Sherman Act. See, *e.g.*, *Doe v. St. Joseph's Hospital*, 788 F.2d at 417 n.10; *Jaffee v. Horton Memorial Hospital*, 680 F. Supp. 125, 127-128 (S.D.N.Y. 1988).

Id. at 764-765, App. 5a, 6a; see also *McLain*, 444 U.S. at 246; *Hospital Building Co. v. Trustees of Rex Hospital*, 425 U.S. 738, 745 (1976). Applying these principles to the particular facts of this case, and comparing its judgment with those reached in other hospital antitrust cases, the Ninth Circuit concluded:

> "The cases in which courts have found Sherman Act jurisdiction involve hospitals whose activities appear to have a much greater effect on interstate commerce than the activities of the hospital in this case. In sum, we hold that 'as a matter of practical economics' Dr. Mitchell has failed to make a sufficient showing of effect on interstate commerce to establish Sherman Act jurisdiction." 853 F.2d at 765-766; App. 8a.

ARGUMENT

Petitioner asserts that the federal courts are confused and inconsistent regarding the proper jurisdictional standard under the Sherman Act, and requests this Court to grant review to clarify the proper jurisdictional test. Petitioner, however, ignores this Court's leading decisions on the issue; disregards the essential nature of the test established by this Court and followed here by the Ninth Circuit; and disregards the significant differences in the facts of those cases he incorrectly asserts are indistinguishable from this case. Petitioner's contentions, therefore, lack any merit.

The Sherman Act prohibits contracts, combinations or conspiracies "in restraint of trade or commerce among the several states," as well as monopolies of "any part of the trade or commerce among the several states." 15 U.S.C. §§ 1, 2. The Sherman Act is concerned with the

integrity of interstate markets and is, therefore, "keyed directly to effects on interstate markets . . . ." *Gulf Oil Corp. v. Copp Paving Co.*, 419 U.S. 186, 194 (1974).

The threshold inquiry in every federal antitrust case, therefore, is whether the plaintiff has shown a sufficient jurisdictional nexus between interstate commerce and the defendants' activities. *Hospital Building Co. v. Trustees of Rex Hospital*, 425 U.S. 738, 742 n.1; *Stone v. William Beaumont Hosp.*, 782 F.2d 609, 613 (6th Cir. 1986). In *McLain v. Real Estate Board of New Orleans, Inc.*, 444 U.S. 232, 242 (1980), this Court held that a plaintiff must establish jurisdiction under the Sherman Act by pleading and showing "either that the defendants' activity is itself in interstate commerce or, if it is local in nature, that it has an effect on some other appreciable activity demonstrably in interstate commerce." Further explaining the relevant inquiry, this Court stated:

> "To establish federal jurisdiction in this case, there remains only the requirement that respondents' activities which allegedly have been infected by a price-fixing conspiracy be shown 'as a matter of practical economics' to have a not insubstantial effect on the interstate commerce involved." *Id.* at 246.

See also *Gulf Oil Corp. v. Copp Paving Co.*, 419 U.S. 186, 195 [the restraint in question must "substantially and adversely affect interstate commerce"]; *Rasmussen v. American Dairy Association*, 472 F.2d 517, 522-523 (9th Cir. 1973), cert. denied 412 U.S. 950 (1973) [the regulated conduct must have a "substantial economic effect upon interstate commerce" or a "real and substantial relation to the national interest"].

This Court has repeatedly recognized and emphasized that the jurisdictional inquiry requires a practical and realistic economic judgment which is grounded in a consideration of the particular facts of each case. *McLain*, 444 U.S. at 246, quoting *Rex Hospital*, 425 U.S. at 745 [the defendant's infected activities must have a substantial effect on interstate commerce "as a matter of practical economics"]; *Goldfarb v. Virginia State Bar*, 421 U.S. 773, 784 n.11 (1975) ["It is in a practical sense that we must view an effect on interstate commerce."]; *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 41-42 (1937) ["We have often said that interstate commerce itself is a practical conception. It is equally true that interference with that commerce must be appraised by a judgment that does not ignore actual experience."]. As the Ninth Circuit observed in *Rasmussen*, 472 F.2d at 523-524: "Whether the requisite 'substantial economic effect' or 'substantial relation to the national interest' is present or absent is a practical, case-by-case economic judgment, not a conclusion derived from application of abstract or mechanistic formulae" or a " 'technical legal conception,' divorced from economic reality."

While decrying the supposed absence of an articulated standard for the assessment of Sherman Act jurisdiction, petitioner proposes just such a "mechanistic formula" by his uncritical reliance on the amount of the Hospital's Medicare reimbursement. As the above authorities make clear, however, the very nature of the Sherman Act precludes a neat, quantifiable jurisdictional standard. Rather, the jurisdictional standards this Court articluated in *McLain* are inherently and necessarily flexible. Precisely because the jurisdictional determinations

must be grounded in a "broad aggregate of factors" characterizing the practical economic realities of each case, the proper test depends upon the experience, wisdom and judgment of the courts. See, *e.g.*, *Feminist Women's Health Center v. Mohammad*, 586 F.2d 530, 540-541 (5th Cir. 1978), cert. denied 444 U.S. 924 (1979); *Doctors, Inc., v. Blue Cross of Greater Philadelphia*, 490 F.2d 48, 51 (3d Cir. 1973). Accordingly, so long as the lower courts reasonably apply the correct standards and principles set forth in *McLain* and its predecessors, as the Ninth Circuit did in this case, further review by this Court is neither necessary nor appropriate.

In this case, the Ninth Circuit correctly understood and articulated these principles in its consideration of the jurisdictional issue. Relying on *McLain*, the Ninth Circuit recognized that the existence of jurisdiction under the Sherman Act turned on whether, "as a matter of practical economics," petitioner demonstrated that the Hospital's essentially local activities "affect[ed] interstate commerce." 853 F.2d at 764, App. 6a. The court further correctly recognized that the jurisdictional inquiry necessarily considers a "broad aggregate of factors" and is a "highly fact-based question calling for common sense judgment." *Id.* at 764, 765, App. 5a, 6a. Thus, the Ninth Circuit's opinion is entirely consistent with the principles articulated by this Court and contains absolutely no doctrinal error which would warrant this Court's review.

The Ninth Circuit also correctly applied these principles in affirming the district court's judgment. Rejecting petitioner's suggestion that it could view the jurisdictional inquiry narrowly and find jurisdiction on the basis of a single factor – the Hospital's receipt of funds from

Medicare and out-of-state private insurers,[3] the Ninth Circuit correctly followed the repeated admonitions of this Court and of the other circuits in considering a broad range of factors describing the practical economic realities of the operation of the Hospital and its radiology department. 853 F.2d at 764-765, App. 5a-6a.

Most importantly, the court found that the Hospital is a small, rural hospital, located far from the nearest state border and urban center, which does not provide services to out-of-state patients.[4] Also, while some of the Hospital's non-radiology supplies may come from out of state, the Hospital procures all of the equipment, film, chemicals and other supplies for its radiology department, the locus of petitioner's claims of unlawful

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[3] Petitioner includes the Hospital's Medi-Cal reimbursement in his accounting. (Medi-Cal is California's Medicaid program.) However, while Medi-Cal is funded in part by federal monies, these funds are included in the *state's* budget. The Hospital receives its Medi-Cal reimbursement, which is in any event assigned by the patients, entirely from the State of California.

[4] Petitioner argues that the record is allegedly ambiguous as to whether the Hospital serves any out-of-state patients or only serves less than one percent out-of-state patients. The record is not ambiguous, but the distinction is trivial in any case and would not change the result. See, *e.g., Pariser v. Christian Health Care Systems, Inc.*, 816 F.2d 1248, 1252-1253 (8th Cir. 1987) [no Sherman Act jurisdiction where, among other things, Illinois residents comprised 98 percent of hospital patients]. Moreover, since petitioner failed to request rehearing on this purportedly important issue, he should not be heard to rely on this alleged error in his petition to this Court.

antitrust activity, from sources in California.[5] Finally, although the Hospital receives certain revenues from Medicare and out-of-state private third-party insurance payors, this revenue is incidental to the Hospital's principal function, which petitioner ignores, the provision of services to patients. Indeed, petitioner fatally misconceives the nature of this revenue, for these funds derive from patient entitlements which are assigned to the Hospital for payment, not from the provision of medical services by the Hospital to the insurers or the federal government. The courts have accordingly rejected undue reliance on reimbursement to support jurisdiction under the Sherman Act in the hospital context: "The mere fact that monies are received from out of state does not establish that the activity 'infected by illegality' has any significant effect on interstate commerce." *Mamakos v. Huntington Hospital*, 653 F. Supp. 1447, 1451 (E.D.N.Y. 1987); see also *Hayden v. Bracy*, 744 F.2d 1338 [even with other factors, Eighth Circuit held that 33% Medicare and

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[5] Petitioner's claim that he needed more discovery to determine the quantity of supplies that were manufactured by or that the Hospital purchased from out-of-state sources is equally meritless. The Ninth Circuit expressly considered and correctly rejected petitioner's contention that this information would change its analysis of the jurisdictional issue. 853 F.2d at 765 n.4, App. 6a. Moreover, petitioner has personal knowledge of the Hospital's activities through his six-year tenure as the Hospital's exclusive radiologist, and received substantial discovery regarding the Hospital's finances in the state proceeding filed over a year before this federal action. In any event, that petitioner may not have received as much discovery as he might have wished is not a persuasive, let alone compelling, basis for this Court's review.

88% third-party payor reimbursement were insufficient to establish jurisdiction].

To hold otherwise, as petitioner advocates, would effectively isolate this factor from the "broad aggregate of factors" necessary for a proper determination of the practical economic realities of the jurisdictional issue. To hold otherwise would necessarily place all hospitals and clinics, and virtually all individual physicians, in interstate commerce for purposes of the Sherman Act, thereby allowing the federal courts to be inundated with antitrust claims based on inherently local disputes over the terms and conditions of health care delivery in communities throughout the United States. Indeed, to hold otherwise would place any business in interstate commerce that accepted consumer credit cards in its otherwise local transactions.

The Ninth Circuit and the district court in this case properly rejected these implications of petitioner's theory in holding, in light of the practical economic realities of this case, that the Hospital's replacement of one exclusive radiologist with another exclusive radiologist was neither in nor substantially affected interstate commerce for purposes of Sherman Act jurisdiction.

Furthermore, contrary to petitioner's contention, the circuits are not split as to the essential extent of jurisdiction under the Sherman Act. Indeed, following *McLain*, the circuits have viewed individual antitrust claims in the Hospital context with increasing skepticism and, on stronger facts than presented here, have rejected jurisdictional claims substantially similar to those petitioner

asserts in this case.[6] For example, in *Doe v. St.Joseph's Hospital*, 788 F.2d 411, 417, the Seventh Circuit held that the plaintiff had failed to establish jurisdiction under the Sherman Act notwithstanding allegations that the defendant hospital treated out-of-state patients, shared medical information and training across state lines, purchased medical supplies out of state and received reimbursement from out-of-state insurance programs. See also, *Seglin v. Esau*, 769 F.2d 1274. Similarly, in *Stone v. William Beaumont Hospital*, 782 F.2d 609, the Sixth Circuit found an insufficient involvement or effect on interstate commerce to support jurisdiction under the Sherman Act where the plaintiff cardiologist had alleged that he treated and received income from out-of-state patients and that the defendant purchased and received supplies and income from out-of-state sources. Again, in *Michigan State Podiatry Assn. v. Blue Cross and Blue Shield of Michigan*, 671 F. Supp. 1139, 1153-1155 (E.D. Mich. 1987), the court

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[6] See, *e.g.*, *Furlong v. Long Island College Hospital*, 710 F.2d 922 (2d Cir. 1983); *Capili v. Shott*, 487 F. Supp. 710 (S.D. W.Va. 1978), *aff'd* 620 F.2d 438 (4th Cir. 1980); *Sarin v. Samaritan Health Center*, 813 F.2d 755 (6th Cir. 1986); *Stone v. William Beaumont Hospital*, 782 F.2d 609 (6th Cir. 1986); *Doe v. St. Joseph's Hospital of Ft. Wayne*, 788 F.2d 411 (7th Cir. 1986); *Seglin v. Esau*, 769 F.2d 1274 (7th Cir. 1985); *Hayden v. Bracy*, 744 F.2d 1338 (8th Cir. 1984); *Jaffe v. Horton Memorial Hospital*, 680 F. Supp. 125 (S.D.N.Y. 1988); *Litman v. A. Barton Hepburn Hospital*, 679 F. Supp. 196, 199-202 (N.D.N.Y. 1988); *Michigan State Podiatry Assn. v. Blue Cross and Blue Shield of Michigan*, 671 F. Supp. 1139, 1153-1155 (E.D. Mich. 1987); *Mamakos v. Huntington Hospital*, 653 F. Supp. 1447 (E.D.N.Y. 1987); *Wright v. Southern Mono Hospital Dist.*, 631 F. Supp. 1294 (E.D. Cal. 1986); *Kling v. St. Paul's Fire & Marine Ins. Co.*, 626 F. Supp. 1285 (C.D. Ill. 1986).

rejected claims that Blue Cross/Blue Shield's cost containment plan constituted an unlawful price fixing scheme substantially affecting interstate commerce even where it contracted with and paid out-of-state physicians for services to its subscribers, its health care plans covered employees whose products were traded widely in interstate commerce, and it administered large amounts of federal and out-of-state private health care funds. Finally, in *Wright v. Southern Mono Hospital Dist.*, 631 F. Supp. 1294, 1318-1319 (E.D. Cal. 1986), the court held that a hospital's exclusive contract for emergency room services did not have a substantial effect on interstate commerce as a matter of practical economics although 4.2% of the ER patients listed out-of-state addresses, 10% of visitors to the nearby Lake Tahoe ski area on the Nevada-California border were from out of state, the hospital received substantial reimbursement from federal and out-of-state private insurers, and the hospital purchased 80% of its equipment and supplies from out of state. The Ninth Circuit's decision in this case, therefore, is entirely consistent with those from the other circuits.

In an attempt to support his claim that the circuits are ostensibly split as to the extent of Sherman Act jurisdiction, petitioner relies on an array of cases, both within the outside the health care context, which found jurisdiction under circumstances purportedly indistinguishable from this case. The courts found jurisdiction in these cases, however, either based on activities in the flow of interstate commerce, or based on an aggregate of factors substantially affecting interstate commerce exceeding that which is presented here. For example, in *Tarelton v. Meharry Medical College*, 717 F.2d 1523 (6th Cir. 1983), a

post-*McLain* case which involved a physician's antitrust challenge to a required faculty medical practice plan, the Sixth Circuit found that the cumulative impact of the defendant's alleged involvement in interstate commerce supported jurisdiction under the Sherman Act where the defendant was a renowned, nationally-based Black medical college, students and faculty were recruited and came from out of state, a substantial portion of the college's patients were from out of state, supplies and equipment for the medical services provided through the challenged medical practice plan were purchased from out-of-state sources, and private and federal funds came from out of state. Similarly, in *Doctor's Inc. v. Blue Cross of Greater Philadelphia*, 490 F.2d 48, a pre-*McLain* case which involved a hospital's antitrust challenge to Blue Cross' domination of the greater Philadelphia market, the court found jurisdiction where defendant Blue Cross had a subscriber base of 2,380,000 persons and an annual distribution of $208,635,550 throughout both Pennsylvania and New Jersey.[7]

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[7] Equally inappropriate is petitioner's reliance on *Feminist Women's Health v. Mohammad*, 586 F.2d 530, 539-541 [Fifth Circuit explicitly emphasizes that the jurisdiction analysis involves an inherently flexible consideration of an aggregate of factors and found jurisdiction based, in part, on defendant's status as a regional interstate center for women's health care and its substantial reliance on the interstate travel of patients]; *Englert v. City of McKeesport*, 736 F.2d 96, 97 (3d Cir. 1984) [alleged unlawful exclusive electrical inspection contract did not affect interstate commerce where much of the construction

(Continued on following page)

The Tenth Circuit's decisions in *Crane v. Intermountain Health Care Inc.*, 637 F.2d 715 (10th Cir. 1980) (en banc) and *Mishler v. St. Anthony's Hospital Systems*, 694 F.2d 1225 (10th Cir. 1981), are similarly inapposite. In *Crane*, the court found that the complaint established jurisdiction where the plaintiff had alleged numerous specific facts showing the defendant hospital's involvement in interstate commerce, including the hospital's provision of pathology services for numerous out-of-state patients and purchase of pathology supplies from out of state. 637 F.2d at 725. Similarly, in *Mishler*, which also arose on the pleadings, the court found jurisdiction in a physician's antitrust challenge to the hospital's emergency room referral procedures based on the cumulative effect of a combination of factors affecting interstate commerce, including the hospital's treatment of out-of-state patients and its operation of an interstate air ambulance service, as well as the purchase of out-of-state supplies and receipt of out-of-state insurance premiums. 694 F.2d at 1227.

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in western Pennsylvania came from out of state, the construction project owners were located and paid their fees from out of state, much of the necessary labor, material and other services came from out of state, and the projects were directly financed by the Department of Housing and Urban Development]; *J.P. Mascaro & Sons, Inc. v. Wm. J. O'Hara, Inc.*, 565 F.2d 264, 265-266 (3d Cir. 1977) [plaintiff and defendant refuse companies served federal and out-of-state customers and were paid from out of state for services to customers; defendants' operations were financed by out-of-state lenders; and defendants purchased equipment manufactured out of state].

Finally, petitioner has consistently misinterpreted the Ninth Circuit's decision in *Palmer v. Roosevelt Lake Log Owners Association, Inc.*, 651 F.2d 1289 (9th Cir. 1981) and *Western Waste Service Systems v. Universal Waste Control*, 616 F.2d 1094 (9th Cir. 1980), cert. denied 449 U.S. 869 (1980). As the Ninth Circuit in the instant case correctly noted, 853 F.2d at 765 n.6, App. 8a, jurisdiction under the Sherman Act was predicated in *Palmer* on an alleged burden imposed directly on the flow of interstate commerce where the defendants allegedly attempted to monopolize the timber salvage trade in Lake Roosevelt, Washington, and 50 to 90 percent of the millions of board feet of salvage would be used directly in the flow of an interstate market supplying 10 percent of the nation's timber. 651 F.2d at 1290, 1292. Similarly, in *Western Waste*, the Ninth Circuit found jurisdiction with respect to an alleged conspiracy to control the rubbish collection business in Phoenix, Arizona, where the defendant hauled significant amounts of scrap materials for out-of-state shipments, the defendant transferred $300,000 monthly to an out-of-state management company and financed its operation through out-of-state lenders, the defendant had attempted to terminate the plaintiff's dealership for an out-of-state equipment supplier and the defendant purchased equipment from out of state. 616 F.2d at 1097-1098.

Significantly, nothing approaching the substantial involvement or effect on interstate commerce alleged in the cases upon which petitioner relies is presented here. Indeed, in stark contrast to these cases, the Hospital's involvement with or effect on interstate commerce is minimal. Regardless of whether the Hospital receives

Medicare and private insurance payments from out of state pursuant to its patients' assignments, the Hospital remains a small, isolated rural facility which provides no services to out-of-state patients and purchases no radiology equipment or supplies from out-of-state sources. It would be difficult to conceive of a health care facility, or even an individual physician, which has less involvement with interstate commerce. As the courts have in various formulations observed: "The reach of Sherman Act jurisdiction, though expansive, is not without limit." *Hayden v. Bracy*, 744 F.2d 1338, 1343. The purely local dispute in this case over how the Hospital's state-required radiology services should be provided so as to best serve the Hospital's patients is precisely that which should not fall within the purview of the Sherman Act.[8]

This Court has repeatedly recognized that even Congress' power to regulate entire industries under the Commerce Clause is limited by the basic principles of federalism inherent in our form of government. See generally, *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528, 581-586 (1985) (O'Connor, J., dissenting). As Chief Justice Hughes observed 50 years ago in *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 37:

> "Undoubtedly the scope of this [commerce] power must be considered in the light of our dual system of

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[8] The appropriately available vehicle for plaintiff's allegations is his claim under California's antitrust law, the Cartwright Act, Cal. Bus. & Prof. Code, §16600 *et seq.*, which is closely analogous to the Sherman Act. See First Amended Complaint, Count 3. Since the state remedy is adequate, there is no preference for the federal action. *Salveson v. Western States Bank Card Assn.*, 731 F.2d 1423, 1427 (9th Cir. 1984).

> government and may not be extended so as to embrace effects on interstate commerce so indirect and remote that to embrace them, in view of our complex society, would effectually obliterate the distinction between what is national and what is local and create a completely centralized government."

The courts' jurisdictional inquiry under the Sherman Act is not merely infused by the same limiting principle, but is necessarily even more circumscribed, for it focuses on the activities of an individual party rather than upon Congress' power to regulate an entire industry or field. In such an inquiry, the courts do not review whether Congress had a rational basis for its enactment of a statute, but determine in the first instance whether, as a matter of practical economics, a party's individual activities have the required real, substantial and material effect on interstate commerce to support jurisdiction under the Act. See *United States v. Darby*, 312 U.S. 100, 120 (1941); *Rasmussen v. American Dairy Association*, 472 F.2d 517, 522-524.[9] Accordingly, the jurisdictional standards articulated by this Court in *McLain* and its predecessors seek to assure that the federal courts will review under the Sherman Act only those alleged restraints which genuinely and substantially affect the integrity of interstate markets.

In this case, the Ninth Circuit and the district court correctly articulated and applied those standards. Both

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[9] For this reason, petitioner's reliance on the Health Care Quality Improvement Act of 1986, 42 U.S.C. §11101 *et seq.*, is entirely inapposite. Similarly, *Katzenbach v. McClung*, 379 U.S. 294 (1964), which considered the constitutionality of Congress' enactment of portions of the Civil Rights Act of 1964, not whether the individual party was in or substantially affected interstate commerce for purposes of the Sherman Act, is irrelevant to the proper inquiry under the Sherman Act.

courts determined that neither the alleged unlawful exclusive contract with Dr. Wentworth for hospital-based radiology services, nor the Hospital's activities "infected" by the alleged unlawful contract, has, as a matter of practical economics, a real, material or substantial effect on the integrity of interstate commerce to support jurisdiction under the Sherman Act. The Ninth Circuit's decision, which affirmed the judgment of the district court, was correct and offers no compelling doctrinal or equitable reason for this Court's further review.

CONCLUSION

For the reasons discussed above, respondents respectfully request that the petition for writ of certiorari be denied.

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Respectfully submitted,

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